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Nos. 08-40, 08-58, 08-67

In the Supreme Court of the United States

JOSEPH HIRKO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

F. SCOTT YEAGER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REX SHELBY

Petitioner,

v.

UNITED STATES OF AMERICA.

Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND CRIMINAL LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND CRIMINAL LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit organization with direct national membership of more than 12,500 attorneys and more than 35,000 affiliate members from all 50 States. NACDL is the only national professional bar association that represents public defenders, private criminal defense lawyers, and law professors. Founded in 1958, NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL routinely files *amicus curiae* briefs in this Court and other courts throughout the country.

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[1] In accordance with Supreme Court Rules 37.2 and 37.6, counsel for *amici* represent as follows: None of the parties or their counsel, nor any other person or entity other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. This brief was authored in its entirety by counsel for *amici*. The parties received timely notice of *amici*'s intent to file this brief and gave their consent. Letters of consent have been filed with the Clerk.

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SUMMARY OF ARGUMENT

The doctrine of collateral estoppel is "embodied in the Fifth Amendment guarantee against double jeopardy" and applies fully in criminal cases. *Ashe v. Swenson*, 397 U.S. 436, 445 (1970). The doctrine acts to prevent the government from prosecuting a defendant for a crime that requires proof of a fact that was "actually and necessarily decided in the defendant's favor" by an earlier jury's verdict of acquittal. *Schiro v. Farley*, 510 U.S. 222, 236 (1994). In its decision below, the Fifth Circuit, "part[ing] ways with [its] sister circuits," wrongly held that a jury's failure to return a verdict on one count of a multi-count indictment can be "weighed" against the jury's judgment of acquittal on a factually overlapping charge in a way that fatally undermines the collateral-estoppel consequences of that acquittal. App. 27a. The Fifth Circuit's decision aggravates an already deep and entrenched circuit split on the "weighing" issue—and, significantly, creates a rule that effectively abolishes the collateral-estoppel doctrine in increasingly common multi-count prosecutions that result in partial verdicts.

Collateral estoppel is an essential component of the Double Jeopardy Clause and is firmly rooted in the Clause's history and tradition. The doctrine works hand-in-hand with the Clause both to protect final judgments and to prevent successive prosecutions. The Fifth Circuit's decision is in the teeth of these two core constitutional policies.

First, by "weighing" mistried counts in the collateral-estoppel calculus, the decision will invariably lead to the unconstitutional disregard of juries' final judgments

of acquittal, thus destroying the "special weight" that acquittals have historically been given in the double-jeopardy analysis. That is because "weighing" a jury's failure to reach a decision on a factually overlapping charge—a failure that means absolutely nothing for double-jeopardy purposes—will by definition create uncertainty that will prevent a defendant from carrying his burden of proving that an issue of ultimate fact was *actually and necessarily* decided in his favor by his earlier acquittal. Indeed, the Fifth Circuit's decision itself makes this point. In rejecting Yeager's assertion that collateral estoppel barred his retrial, the court unsurprisingly found—*after* "consider[ing] the hung counts along with the acquittals"—"a potential inconsistency, making it impossible for [it] to decide with any certainty what the jury necessarily determined." App. 22a. But to reach this decision, the court had to disregard Yeager's acquittals, which themselves indicated "that Yeager is correct that collateral estoppel bars a retrial." *Id.* The Fifth Circuit's "weighing," therefore, is tantamount to a *per se* no-estoppel rule.

Second, the Fifth Circuit's decision creates a gaping hole in the Double Jeopardy Clause's protections against successive prosecutions. By allowing a jury's failure to reach a verdict on one count to trump an acquittal in a partial-verdict case, the decision perversely incentivizes the government to charge as many overlapping counts as possible—and to do so precisely so that it can avoid the collateral-estoppel consequences of that acquittal. That is because, under the Fifth Circuit's approach, when a jury acquits a defendant on some counts but hangs on another with a related element, the government is free to retool its case against the defendant on the mistried count in a future prosecution even where the acquittals,

when "consider[ed] ... by themselves," would estop the prosecution of the mistried count. App. 22a. The Fifth Circuit's decision thus rewards prosecutors for overcharging their cases and then failing to prove the superfluous charges. That result turns the Double Jeopardy Clause on its head.

ARGUMENT

These cases present a question of vital importance to the criminal justice system: Whether, consistent with the Double Jeopardy Clause, a jury's failure to reach a decision on one count of a multi-count indictment (here, the "hung" or "mistried" count) can be "weighed" against an acquittal on a factually related count in a manner that diminishes the acquittal's collateral-estoppel effect for future prosecutions. The petitioners have already detailed the deep and entrenched circuit split that exists on that question. *See* Hirko Pet. 16-24; Yeager Pet. 12-22; Shelby Pet. 9-16. Briefly, the First, Fifth, and D.C. Circuits have held that weighing mistried counts against acquitted counts is permissible under the Double Jeopardy Clause; the Sixth, Seventh, Ninth, and Eleventh Circuits have held that such weighing violates that Clause's collateral-estoppel component. And, indeed, in the decision below, the Fifth Circuit candidly acknowledged that by "weigh[ing] hung counts in applying collateral estoppel" it was "part[ing] ways with [its] sister circuits." App. 22a, 27a. The existence of the split, therefore—which is reason enough to grant certiorari—is well-established, and there is no point in replowing that ground here.

This brief seeks, instead, to emphasize two additional points: first, that the doctrine of collateral estoppel

has historically played, and continues to play, an important role in promoting the fundamental purposes of the Double Jeopardy Clause; and second, that the Fifth Circuit's rationale in this case would eviscerate the collateral-estoppel doctrine as it applies to an increasingly large swath of criminal cases, particularly in this age of overlapping federal offenses that provide multiple means of imposing criminal liability for the same underlying conduct.

I. The Collateral-Estoppel Doctrine Is Part and Parcel Of The Double Jeopardy Clause.

A. *Ashe v. Swenson* Established The Applicability Of Collateral Estoppel As A Rule Of Constitutional Criminal Procedure.

The doctrine of collateral estoppel operates as "an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). Collateral-estoppel issues arise most often, of course, in civil litigation between private parties. Importantly, however, this Court in *Ashe* recognized that collateral-estoppel principles are "embodied in the Fifth Amendment guarantee against double jeopardy" and apply with full force in criminal cases. *Id.* at 445.

As a rule of constitutional criminal procedure, collateral estoppel operates to prevent the government from prosecuting a defendant for a crime that requires proof

of a fact previously decided in the defendant's favor by an earlier jury's verdict of acquittal. The critical question that controls the doctrine's application is whether the particular fact was indeed "actually and necessarily decided" for the defendant as part of the earlier acquittal. *Schiro v. Farley*, 510 U.S. 222, 236 (1994). If it was, then the government is barred—collaterally estopped—by the Double Jeopardy Clause from re-prosecuting.

Collateral-estoppel doctrine, this Court said in *Ashe*, "is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." *Ashe*, 397 U.S. at 444. A court's review, in other words, "'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.'" *Id.* (internal citation omitted). In particular, in deciding for "constitutional collateral estoppel" purposes whether a fact was "actually and necessarily decided" in the defendant's favor, *Schiro*, 510 U.S. at 232, 236, "a court [must] 'examine the record of [the] prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'" *Ashe*, 397 U.S. at 444 (internal citation omitted). The point of the pragmatism is clear: "Any test more technically restrictive would ... simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal." *Id.*

By preventing the relitigation of a controlling fact once it has necessarily been determined, *Ashe* plays a crucial role in ensuring the core protections of the Dou-

ble Jeopardy Clause. But, to be clear, *Ashe* hardly gives criminal defendants a free pass. Under *Ashe*, it is the acquitted defendant—not the government—who bears the burden of proof. In particular, in order to invoke collateral estoppel to prevent successive prosecution on a factually overlapping charge, the defendant must demonstrate that a fact necessary to the government's case was "actually and necessarily decided" in his favor as part of his earlier acquittal. *Schiro*, 510 U.S. at 236; *accord Dowling v. United States*, 493 U.S. 342, 350-51 (1990) (same). *Ashe*, therefore, erects a high bar, which significantly limits collateral estoppel's real-world operation. *See Dowling*, 493 U.S. at 358 (Brennan, J., dissenting).

Petitioners Hirko, Yeager, and Shelby would seem to fall squarely within the narrow-but-essential protection of *Ashe*: Each defendant staked his case on one controlling issue, and each defendant's acquittal indicates that the jury must have "actually and necessarily decided" that issue in the defendant's favor. Hirko's case is illustrative. Hirko was charged (as relevant here) with securities fraud, wire fraud, and money laundering stemming from those underlying frauds. Hirko contested but a single element of the Government's money-laundering charge and "stipulated to the other elements." App. 16a-17a. Hirko's targeted defense: that his conduct did not involve "criminally derived" funds, 18 U.S.C. § 1957, because he did not commit the acts of wire and securities fraud on which the money-laundering charges were predicated. App. 16a-17a. In acquitting Hirko of money laundering, the jury *must* have decided that he did not commit the underlying frauds. Those frauds, therefore, cannot be relitigated in any future prosecution. *See Dowling*, 493 U.S. at 350; *Ashe*, 397

U.S. at 443.[3] The same basic analysis applies to Yeager (Pet. 4-6) and Shelby (Pet. 5-8). Under a straightforward application of controlling precedent, then, the Government's attempt here to institute new charges that require, in part, a different determination by a second jury of facts previously established in the petitioners' favor should be barred.

The Fifth Circuit reached a contrary conclusion based on logic that, if credited, would eviscerate the collateral-estoppel doctrine—and *Ashe*—in a whole host of multi-count prosecutions. In performing its *Ashe* analysis, rather than focusing on the jury's actual decisions—the acquittals—the Fifth Circuit gave controlling weight to the jury's *failure to reach a decision* on factually related counts charged in the petitioners' first trial. In doing so, the Fifth Circuit exacerbated an already deep and entrenched circuit split—and, far worse, created what amounts to a partial-verdict loophole in the collateral-estoppel doctrine, a loophole that, as we explain in Part II, undermines the very principles that the Double Jeopardy Clause was designed to protect.

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[3] Hirko is clearly correct that the only reasonable reading of the Fifth Circuit's opinion (as it relates to him) is that the court treated the jury's failure to reach a decision on the predicate frauds as reason to disregard the clear import of Hirko's money-laundering acquittals. *See* Hirko Pet. 28. If the Fifth Circuit intended the literal meaning of what it said, at least in part—that the jury "had to acquit" Hirko on the money laundering counts "[s]ince it could not determine whether Hirko committed" the predicate frauds (App. 18a)—then its decision is so manifestly wrong as to warrant summary reversal. It is hard to imagine a principle more basic than that a jury that *cannot decide* whether a criminal defendant committed a charged act must hang, not acquit. Indecision leads to a mistrial, not an exoneration. *See, e.g.*, *United States v. Gotti*, 451 F.3d 133, 137 (2d Cir. 2006); Fed. R. Crim. P. 31(b)(3).

B. The Collateral-Estoppel Doctrine Is Firmly Rooted In The Double Jeopardy Clause's History And Tradition.

The Double Jeopardy Clause states that no person "shall ... be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Clause has deep roots in British common law and, in particular, in the common-law pleas of *autrefois acquit*, *autrefois convict*, and pardon. As Blackstone noted, "the plea of *autrefois acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence." 4 William Blackstone, *Commentaries* 335, *quoted in Green v. United States*, 355 U.S. 184, 187 (1957).

The Clause's history demonstrates that a primary purpose of double-jeopardy protection at common law was to prevent multiple prosecutions arising out of the same conduct. Concerns about successive prosecutions, in turn, arose from the twin beliefs that final factual determinations should be respected and that prosecutors should not get multiple opportunities to convict. *See* Anne B. Poulin, *The Limits of Double Jeopardy: A Course Into The Dark?* 39 Vill. L. Rev. 627, 639 (1994) ("The original purpose of double jeopardy protection and its predecessors was to preserve the finality of judgments."); *id.* at 633-34 ("Double jeopardy protects the defendant's interest in freedom from multiple trials and multiple punishments ...."). As we explain below, the Fifth Circuit's decision here violates not one but both of these common-law commitments.

The collateral-estoppel doctrine, as applied in criminal cases, shares the same basic pedigree. It is closely linked to the history and traditions that underlie the Double Jeopardy Clause itself. Writing for the Court nearly a century ago, Justice Holmes emphasized that connection in *United States v. Oppenheimer*: "[T]he 5th Amendment was not intended to do away with what in the civil law is a fundamental principle of justice in order, when a man once has been acquitted on the merits, to enable to government to prosecute him a second time." 242 U.S. 85, 88 (1916) (internal citation omitted). Some years later, in *Ashe*, this Court made even more explicit the historical relationship between the Double Jeopardy Clause and collateral estoppel. *See* 397 U.S. at 446 n.10. (explaining how collateral estoppel "became a safeguard firmly embedded in federal law"); *see also* Anne B. Poulin, *Collateral Estoppel in Criminal Cases: Reuse of Evidence After Acquittal*, 58 U. Cin. L. Rev. 1, 12 (1989) ("If the first proceeding ends in acquittal, of course, collateral estoppel comes into play as well as basic double jeopardy protection.").

The linkage should come as no surprise. It fits hand-in-glove with the rise of the modern criminal code. Protections against double jeopardy developed at a time when crimes were creatures of the court-crafted common law and when legislatures played virtually no role in their definition. *See* Anne B. Poulin, *Double Jeopardy Protection from Successive Prosecutions: A Proposed Approach*, 92 Geo. L.J. 1183, 1200 (2004). In those days, there were far fewer crimes, and courts defined the elements of those crimes very clearly and very simply. As this Court has explained that era, "at common law, and under early federal criminal statutes, offense categories were relatively few and distinct." *Ashe*, 397 U.S. at 446

n.10. Accordingly, as an historical matter, *autrefois acquit* provided sufficient protection to the accused because "[a] single course of criminal conduct was likely to yield but a single offense." *Id.*

The evolution of complex criminal codes, however, brought about a sea change. As legislatures began establishing crimes and assigning elements, they often used detailed, technical language that was not always consistent from one provision to another. *See* Poulin, *supra*, 92 Geo. L.J. at 1200. Not surprisingly, "[a]s the number of statutory offenses multiplied, the potential for unfair and abusive reprosecutions became far more pronounced." *Ashe*, 397 U.S. at 446 n.10. That was because "with the advent of specificity in draftsmanship and the extraordinary proliferation of overlapping and related statutory offenses, it became possible for prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transaction." *Id.*

It was as a result of this dramatic shift—from the relative simplicity of the common law to the complexity of the modern code—that "federal courts soon recognized the need to prevent such abuses through the doctrine of collateral estoppel, and it became a safeguard firmly embedded in federal law." *Id.* Meticulously tracing the history, and echoing Justice Holmes' opinion in *Oppenheimer*, this Court in *Ashe* reiterated that the principles of fundamental fairness (and systemic efficiency) that underlie civil collateral estoppel must apply with equal force in the criminal context—and, more particularly, that those principles are part and parcel of the Double Jeopardy Clause. *See id.* at 445.

II. The Fifth Circuit's Decision Eviscerates The Collateral-Estoppel Doctrine In Multi-Count Prosecutions That Result In Partial Verdicts.

Double-jeopardy protections against multiple prosecutions address two fundamental concerns in our legal system. First, the Double Jeopardy Clause is specifically designed to safeguard final judgments. *See, e.g.*, *United States v. Scott*, 437 U.S. 82, 92 (1978) ("[T]he primary purpose of the Double Jeopardy Clause was to protect the integrity of a final judgment."). Second, and relatedly, the Clause ensures that an acquitted defendant is not subjected to a do-over in which the prosecutor hopes to refine his case or strike a more favorable jury. *See, e.g.*, *Tibbs v. Florida*, 457 U.S. 31, 41 (1982) ("'[T]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.'" (quoting *Burks v. United States*, 437 U.S. 1, 11 (1978)). Collateral estoppel, as applied by this Court in *Ashe*, addresses the very same two concerns. *See Crist v. Bretz*, 437 U.S. 28, 33 (1978) ("A primary purpose" served by the Double Jeopardy Clause is "akin to that served by the doctrines of res judicata and collateral estoppel—to preserve the finality of judgments."); *Ashe*, 397 U.S. at 446 (Collateral estoppel "protects a man who has been acquitted from having to 'run the gantlet' a second time.") (internal citation omitted).

The Fifth Circuit's decision below ignores—and worse, actually undermines—both of these double-jeopardy/collateral-estoppel principles. First, by "weighing" mistried counts in the collateral-estoppel analysis, the decision eliminates the special significance that has traditionally been accorded acquittals. And second, by

allowing a mistried count to trump an acquittal in a partial-verdict scenario, the decision incentivizes prosecutors to overcharge criminal defendants as a means of paving the way for a retrial in the event that the jury acquits on some counts but hangs on others.

A. The Fifth Circuit's Decision Undermines The Integrity Of Final Judgments And The Special Significance Given To Acquittals.

This Court's double-jeopardy decisions make one principle absolutely clear: An acquittal is a constitutionally significant event that is "accorded special weight" in the Fifth Amendment analysis. *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980); *Tibbs*, 457 U.S. at 41 (same); *accord Poland v. Arizona*, 476 U.S. 147, 156 (1986) ("'[T]he law attaches particular significance to an acquittal.'" (quoting *Scott*, 437 U.S. at 91 (1978)). "'The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal,' for the 'public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though 'the acquittal was based upon an egregiously erroneous foundation.'" *DiFrancesco*, 449 U.S. at 129 (quoting *Fong Foo v. United States*, 369 U.S. 141, 143 (1962)). Put slightly differently, "[i]f the innocence of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair." *Arizona v. Washington*, 434 U.S. 497, 503 (1978).

The Fifth Circuit's decision ignores altogether—and, as we will show, flips on its head—the "special weight" given to acquittals. In its *Ashe* analysis, the Fifth Circuit "part[ed] ways with [its] sister circuits" and concluded

that it was bound to "weigh hung counts" in assessing the collateral-estoppel effect of an acquittal. App. 22a, 27a. It did so even though it is well established that a hung, or mistried, count means *precisely nothing* for double-jeopardy purposes. Unlike an acquittal, which says something specific and concrete—namely, that the jury has unanimously concluded that the defendant is not guilty of the charged offense—a mistrial is a constitutional non-event. *See Richardson v. United States*, 468 U.S. 317, 325 (1984) (noting that "the protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy" and that "the failure of the jury to reach a verdict is not an event which terminates jeopardy").

The Fifth Circuit's analysis wrongly "presumes that a mistried count, like an acquitted count, is a decision for which we can discern, or to which we can impute, a single basis." *United States v. Ohayon*, 483 F.3d 1281, 1289 (11th Cir. 2007) (Pryor, J.). It is not. "[T]he failure of a jury to reach a verdict is not a decision; it is a failure to reach a decision." *Id.* Partial verdicts cannot be reconciled for the simple reason that "the mistried count is not a decision for which we can discern, or to which we can impute, a single, rational basis. The very essence of a mistried count is that the jury failed to reach agreement." *Id.*; *see also United States v. Romeo*, 114 F.3d 141, 144 (9th Cir. 1997) ("Because there are so many variable factors which can cause a jury not to reach a verdict, we will not speculate on why the jury could not agree. The inquiry under *Ashe* is what the jury actually decided when it reached its verdict, not ... why the jury could not agree on the deadlocked count.").

Because a mistried count is a double-jeopardy non-event, it cannot be "weighed" or otherwise used to devalue, let alone trump, a jury's final, and conclusive, judgment of acquittal. The Fifth Circuit's contrary conclusion cannot be reconciled with the acknowledged purpose of the Double Jeopardy Clause—and its component collateral-estoppel doctrine—to safeguard acquittals.

The wrongheadedness of the Fifth Circuit's approach is magnified once it is realized that the practice of "weighing" mistried counts against an acquittal to determine the acquittal's collateral-estoppel effect will, in actuality, result in a *per se* no-estoppel rule for partial verdicts. The reason lies in the stringent showing that an acquitted defendant must make in order to avail himself of the collateral-estoppel doctrine—namely, that an issue of ultimate fact was *actually and necessarily decided* in his favor in the course of the earlier acquittal. If a mistried count on a charge with a factually overlapping element can be considered, or "weighed," in the collateral-estoppel calculus, then it will, by definition, create uncertainty regarding the jury's verdict of acquittal, thereby preventing the acquitted defendant from establishing what the jury necessarily decided when it acquitted him. *See Ohayon*, 483 F.3d at 1289 (recognizing that "the search for the basis of a mistried count will necessarily be in vain"). Accordingly, *every* time a hung count is considered in determining the collateral-estoppel consequences of a defendant's acquittal of a crime that shares one or more factually related elements, the hung count will act to preclude the defendant from getting the benefit of his acquittal.

That problem is exacerbated because a defendant has no practical way of peeking behind the jury's verdict

to determine, in actuality, why the jury acquitted him on one count while failing to reach a decision on another factually related count. A defendant typically cannot obtain and admit evidence concerning the jury's deliberations in order to establish why the jury hung or to discern what the jurors' failure to decide may or may not mean. *See* Fed. R. Evid. 606(b). Indeed, "[c]ourts have always resisted inquiring into a jury's thought processes" on the ground that "this deference to the jury brings to the criminal process, in addition to the collective judgment of the community, an element of needed finality." *United States v. Powell*, 469 U.S. 57, 67 (1984). Without the practical ability to discover and use evidence necessary to understand definitively a jury's decision to acquit on one charge and to hang on another, a defendant's already-difficult burden under *Ashe* becomes insurmountable.

The Fifth Circuit's decision itself actually makes our point that "weighing" mistried counts will invariably lead to the unconstitutional disregard of a defendant's acquittal. Consider Yeager's case. In rejecting Yeager's assertion that collateral estoppel barred his retrial, the court unsurprisingly found—only *after* "consider[ing] the hung counts along with the acquittals"—"a potential inconsistency, making it impossible for [it] to decide with any certainty what the jury necessarily determined." App. 22a. To reach this decision, however, the court had to disregard the acknowledged fact that Yeager's acquittals, when "consider[ed] ... by themselves," indicated "that Yeager is correct that collateral estoppel bars a retrial." *Id.*

The Fifth Circuit's decision is thus squarely at odds with the Double Jeopardy Clause's core purpose of pro-

tecting final judgments. This Court should grant certiorari to make clear, as the majority of the courts to consider the question have held, that mistried counts are irrelevant to the application of collateral estoppel in criminal cases. Absent this Court's intervention, the Fifth Circuit (along with the First and D.C. Circuits) will continue to rely on mistried counts—double jeopardy non-events—to undermine conclusive judgments of acquittal and their "special weight" under the Double Jeopardy Clause. *DiFrancesco*, 449 U.S. at 129; *Tibbs*, 457 U.S. at 41 (same); *accord Poland*, 476 U.S. at 156 ("'particular significance'" (quoting *Scott*, 437 U.S. at 91)).

B. The Fifth Circuit's Decision Will Encourage Overcharging And Facilitate Successive Prosecutions.

The Fifth Circuit's decision simultaneously undermines the Double Jeopardy Clause's second core function—the protection against successive prosecutions. The decision all but ensures that criminal defendants will increasingly face compound, multi-count indictments and (what is worse) exposes them to the very real possibility of successive prosecutions for factually related crimes arising out of the same underlying conduct. By creating a rule in which a simultaneously charged hung count can trump a factually related acquitted count—thereby paving the way for a retrial—the Fifth Circuit's decision perversely incentivizes prosecutors to charge as many overlapping counts as possible. The reason is simple: Overcharging gives the government the best chance of evading the collateral-estoppel consequences of—in effect, insuring against—an acquittal. Where, as here, a jury acquits a defendant on one count but for some un-

known—and unknowable—reason hangs on a count with a related element, the government is free, under the Fifth Circuit's rationale, to wipe the slate clean, retry the mistried count, and, for that matter, bring any other charge that otherwise would have been barred by *Ashe*. And *why not* "lard[] the indictment with multiple offenses based on the same conduct"? Hirko Pet. 26. There is, from a prosecutor's strategic perspective, absolutely nothing to lose and absolutely everything to gain.

Think, again, about Hirko's case. It is undisputed that Hirko contested only one element of the money-laundering charges brought against him: He denied committing the underlying acts of wire and securities fraud that the Government relied on to show that his conduct involved "criminally derived" funds under the money-laundering statute. App. 16a. Hirko, of course, was acquitted on the money-laundering counts. The only rational way to understand the acquittals is as resting on a factual finding that Hirko did not commit the underlying frauds. In other words, "consider[ing] the acquittals by themselves" (App. 22a) shows that the jury unanimously concluded that the Government failed to prove that Hirko committed the predicate frauds.

It is therefore common ground that if Hirko had been charged in this case with money laundering *only*, the Double Jeopardy Clause (by way of collateral estoppel) would preclude the Government from later trying Hirko for the predicate frauds. *See Powell*, 469 U.S. at 64. But under the Fifth Circuit's rationale, everything changes—and the collateral-estoppel bar vanishes—simply because the Government charged the predicate frauds alongside money laundering and because, for whatever reason, the jury hung on the fraud counts. The

inequity of that situation is patent, and the incentives it creates are perverse.

Jettisoning collateral estoppel in partial-verdict cases, as the Fifth Circuit has done, creates a gaping hole in the fundamental constitutional protections against successive prosecutions. *See Schiro*, 510 U.S. at 230. Because the Fifth Circuit's rule allows "a second jury to reconsider the very issue upon which the defendant has prevailed," it "implicates concerns about the injustice of exposing a defendant to repeated risks of conviction for the same conduct, and to the ordeal of multiple trials, that lie at the heart of the double jeopardy clause." *United States v. Mespoulede*, 597 F.2d 329, 337 (2d Cir. 1979). Casting aside this core protective function of the Clause, the Fifth Circuit has created a system with little to "prevent[] the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction." *Tibbs*, 457 U.S. at 41. This greatly increases the risk of "[r]epeated prosecutorial sallies [that] unfairly burden the defendant and create a risk of conviction through sheer governmental perseverance." *Id.*

The practical threat posed by the Fifth Circuit's decision is very real. Legislatures are creating new—and often complex—criminal offenses every day. The federal criminal law, in particular, continues to experience explosive growth. *See* John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, Heritage Foundation Legal Memorandum 26 (June 16, 2008), *available at* www.heritage.org/research/legalissues/lm26.cfm (cataloguing approximately 4,450 federal crimes and noting that Congress continues to adopt new crimes at a rate of about 57 per year). This continuing proliferation of

criminal statutes permits prosecutors to charge numerous overlapping offenses to cover a single course of criminal conduct. *See, e.g.*, *United States v. Bailin*, 977 F.2d 270, 277 (7th Cir. 1992) ("Prosecutors have the discretion to charge a defendant who is accused of a rather limited criminal act with numerous separate crimes. But because the technical elements necessary to establish these different crimes often differ, the defendant who is acquitted on only some counts may receive no formal double jeopardy protection."). Prosecutors therefore clearly have the *opportunity* to skirt double-jeopardy protections by filing bloated multi-count indictments. And the Fifth Circuit's stingy view of collateral estoppel gives prosecutors the *incentive* to do just that. It leads to precisely the sort of agglomeration of prosecutorial power that led this Court in *Ashe* to reiterate the centrality of collateral estoppel to double-jeopardy doctrine. *See Ashe*, 397 U.S. at 446 n.10.

The Fifth Circuit's decision in this case discards core protections for acquitted defendants in exchange for a system that rewards prosecutors for overcharging their cases and then failing to prove the superfluous charges. This Court should step in to ensure that double-jeopardy principles are not so easily evaded.

CONCLUSION

For the foregoing reasons, this Court should grant the petitions for certiorari.

Respectfully submitted,

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